

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

----- In the Matter of -----)  
)  
JAMES RUSSELL BERG and PATRICIA JO )  
BERG, )  
Complainants, )  
)  
vs. )  
)  
PRINCEVILLE UTILITIES COMPANY, )  
INC., )  
Respondent. )  
\_\_\_\_\_)

DOCKET NO. 04-0330

ORDER NO. 21834

Filed May 20, 2005  
At 10 o'clock A.M.

Karen Higashi  
Chief Clerk of the Commission

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Chief Clerk, Public Utilities  
Commission, State of Hawaii.

K. Higashi

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

----- In the Matter of -----)	
JAMES RUSSELL BERG and PATRICIA JO )	Docket No. 04-0330
BERG, )	
Complainants, )	Order No. 21834
vs. )	
PRINCEVILLE UTILITIES COMPANY, )	
INC., )	
Respondent. )	
_____ )	

ORDER

By this Order, the commission: (1) denies PRINCEVILLE UTILITIES COMPANY, INC.'s ("Respondent") January 10, 2005 motion to dismiss JAMES RUSSELL BERG's and PATRICIA JO BERG's (collectively, "Complainants") November 14, 2004 formal complaint ("Motion to Dismiss") (collectively, Complainants and Respondent referred to as "Parties"); (2) directs the Parties to participate in nonbinding mediation prior to the commencement of a commission hearing in this matter, subject to the guidelines and conditions set forth in Section II. below; and (3) suspends all further proceedings in this matter pending the outcome of the nonbinding mediation.

I.

Introduction

On November 15, 2004, Complainants filed a formal complaint ("Complaint") with the commission against Respondent,

pursuant to Hawaii Administrative Rules ("HAR") chapter 6-61, subchapter 5. Respondent is a provider of water utility service in the service area of Princeville, island of Kauai, State of Hawaii. Complainants are consumers of Respondent's water utility service.

Complainants allege that, at issue is: (1) whether Respondent violated the Agreement, dated April 29, 1997 (the "Agreement"), when Respondent transferred a contribution-in-aid-of-construction ("CIAC") credit/meter fee waiver, from Lot 10, Unit A, of the Anini Vista Estates Subdivision, to Lot 5, Unit C; and (2) should the commission find that said transfer was permissible, Respondent failed to amend and record changes to said Agreement. Complainants seek commission action requiring Respondent "to refund the CIAC fee [Complainants] paid (\$12,707)." <sup>1</sup>

On December 17, 2004, the commission issued Order No. 21496 directing Respondent to satisfy the matters raised in the Complaint and file an answer reporting that it has satisfied the matters raised in the Complaint or file an answer to the Complaint within twenty (20) days after the date of service of Order No. 21496.

On January 10, 2005, Respondent filed its Motion to Dismiss, pursuant to HAR §§ 6-61-41 and 6-61-69 or, in the alternative, its answer to the Complaint in accordance with Order No. 21496 ("Answer"), pursuant to HAR § 6-61-68.

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<sup>1</sup>Complaint, at 3.

On January 19, 2005, Complainants filed their response to Respondent's Motion to Dismiss and Answer.

## II.

### Discussion

#### A.

#### Respondent's Motion to Dismiss

HAR Chapter 6-61 is silent in setting forth the standard of review for granting a HAR § 6-61-69 motion to dismiss because the complaint fails to state a claim upon which relief can be granted. As such, consistent with HAR § 6-61-1, we will refer to the Hawaii Rules of Civil Procedure ("HRCP") for guidance.

A HAR § 6-61-69 motion to dismiss is phrased, in part, much like that of a HRCP Rule 12(b)(6) motion to dismiss. Although Respondent's Motion to Dismiss is styled as a motion to dismiss under HRCP Rule 12(b)(6), we conclude that, in this case, it should be treated and reviewed under HRCP Rule 56, relating to summary judgment, as the Parties presented various matters outside of the pleadings including exhibits (i.e., letters) and an affidavit. *State Farm Fire and Casualty Company v. Pacific Rent-All, Inc.*, 90 Hawai'i 315, 322, 978 P.2d 753, 760 (1999); *see also, Shoreline Transp., Inc. v. Robert's Tours and Transp., Inc.*, 70 Haw. 585, 588, 779 P.2d 868, 870 (1989) (commission treated the motions to dismiss as pleas for summary judgment as additional documents were attached to the pleadings). We, therefore, will review Respondent's Motion to Dismiss

pursuant to the standard relating to summary judgment. As the courts have often articulated:

[s]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

*Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Hawai'i 85, 104, 839 P.2d 10, 22 (1992); see also, HRCF Rule 56(c). "The evidence must be viewed in the light most favorable to the non-moving party." *State ex rel. Bronster v. Yoshina*, 84 Hawai'i 179, 186, 932 P.2d 316, 323 (1997). In other words, "we must view all of the evidence and the inferences drawn therefrom in the light most favorable to [the party opposing the motion]." *Maguire v. Hilton Hotels Corp.*, 79 Hawai'i 110,112, 899 P.2d 393, 395 (1995).

Viewing the pleadings and all of the evidence and the inferences drawn from the record in the light most favorable to the non-moving party or Complainants, the commission is not convinced that there is no genuine issue as to any material fact and that the moving party or Respondent is entitled to judgment as a matter of law. Accordingly, the commission is unable to conclude, as a matter of law, that dismissal of the Complaint is appropriate, and, thus, will deny Respondent's Motion to Dismiss.

B.

#### Mediation

HAR § 6-61-70 provides, in relevant part, that "[w]hen a respondent has filed its answer, the commission shall set a

hearing on the complaint." However, Hawaii Revised Statutes ("HRS") § 269-15.6 provides that "[t]he commission may require the parties in any matter before the commission to participate in nonbinding arbitration, mediation, or other alternative dispute resolution process prior to the hearing."<sup>2</sup>

In light of the commission's denial of Respondent's Motion to Dismiss and since it appears that Respondent did not satisfy the matters complained of in the Complaint and has instead filed its Answer on January 10, 2005 setting forth its grounds of defense, both of law and of fact, the commission recognizes that the next step is to set a hearing date for this matter, pursuant to HAR § 6-61-70. However, upon review of the pleadings filed in this matter, the commission finds that it may be more beneficial and efficient for both Complainant and Respondent to participate in nonbinding mediation<sup>3</sup> prior to holding a hearing in this docket.

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<sup>2</sup>HRS § 91-8.5 also provides, in relevant part:

**Mediation in contested cases.** (a) An agency may encourage parties to a contested case hearing under this chapter to participate in mediation prior to the hearing subject to conditions imposed by the agency in rules adopted in accordance with this chapter. The agency may suspend all further proceedings in the contested case pending the outcome of the mediation.

HRS § 91-8.5(a) (Supp. 2003).

<sup>3</sup>"Mediation" is a process in which a neutral facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute. The mediator normally uses a variety of skills and techniques to help parties communicate, negotiate, and reach agreements and settlements. While mediators may, under certain circumstances, make suggestions about potential resolutions to the parties, they

Accordingly, pursuant to HRS § 269-15.6 and consistent with HRS § 91-8.5, the commission will direct the Parties to participate in nonbinding mediation prior to the commencement of a commission hearing in this matter, subject to the following guidelines and conditions:

1. The Parties may jointly select a person to conduct the mediation. If the Parties are unable to jointly select a mediator, the Parties shall inform the commission within ten (10) days of the date of this Order of the non-selection, and the commission will select the mediator.
2. Unless otherwise extended by the commission, the mediation period shall not exceed thirty (30) days from the date of this Order. The Parties shall report in writing the status of its mediation within twenty (20) days from the date of this Order. If the matter in this docket has not been resolved within the mediation period, a hearing on this matter will be scheduled by the commission, and the Parties will be informed of the date, place and time of the hearing through a notice of hearing

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have no authority to bind the commission in matters that are within our statutory purview.

to be issued subsequent to the mediation period.

3. Unless otherwise provided by law, ordered by the commission, or agreed to by the Parties, all costs of the mediation shall be borne equally by the Parties.
4. No mediation statements or settlement offers tendered shall be admitted into any subsequent proceedings involving this matter.

In addition, consistent with HRS § 91-8.5, the commission will suspend all further proceedings in this matter pending the outcome of the nonbinding mediation.

### III.

#### Orders

##### THE COMMISSION ORDERS:

1. Respondent's Motion to Dismiss is denied.
2. Complainants and Respondent shall participate in nonbinding mediation prior to the commencement of a commission hearing in this matter, subject to the guidelines and conditions set forth in Section II. above. All further proceedings in this matter are suspended pending the outcome of the nonbinding mediation.



DONE at Honolulu, Hawaii MAY 20 2005.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By Carlito P. Caliboso  
Carlito P. Caliboso, Chairman

By Wayne H. Kimura  
Wayne H. Kimura, Commissioner

By Janet E. Kawelo  
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:

Catherine P. Awakuni  
Catherine P. Awakuni  
Commission Counsel

04-0330.eh

CERTIFICATE OF SERVICE

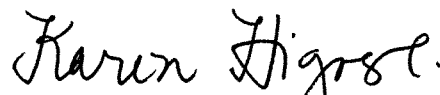
I hereby certify that I have this date served a copy of the foregoing Order No. 21834 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
DIVISION OF CONSUMER ADVOCACY  
P. O. Box 541  
Honolulu, HI 96809

JAMES RUSSELL BERG  
PATRICIA JO BERG  
P. O. Box 223504  
Princeville, Kauai, HI 96722

PRINCEVILLE UTILITIES COMPANY, INC.  
P. O. Box 223040  
Princeville, Kauai, HI 96722

MICHAEL H. LAU, ESQ.  
ISHIKAWA, MORIHARA, LAU & FONG LLP  
841 Bishop Street  
Davies Pacific Center, Suite 400  
Honolulu, HI 96813

  
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Karen Higashi

DATED: MAY 20 2005